(5)

No. 10-1249

JUN 3 2011

IN THE

Supreme Court of the United States

RICHARD A. TROPP,
on behalf of himself and all others similarly situated,

Petitioner,

v.

CORPORATION OF LLOYD'S,
also known as THE SOCIETY OF LLOYD'S

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JOHN W. BREWER
Counsel of Record
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212)-859-8000
john.brewer@friedfrank.com

Attorneys for Respondent

236421

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, respondent Corporation of Lloyd's, also known as The Society of Lloyd's ("Lloyd's") makes the following disclosures:

1. Lloyd's has no parent corporation.

2. No publicly held corporation owns 10% or more of Lloyd's stock.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT ...	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
Nature of the Lloyd's Market and the "R&R" and Equitas Transactions	2
Relevant Prior Litigation in the U.S. Courts Between Names and Lloyd's	7
Petitioner's Underwriting and Litigation History	9
REASONS FOR DENYING THE PETITION ...	13
I. MR. TROPP HAS OFFERED NO REASON FOR THIS COURT TO REVIEW THE UNANIMOUS CONCLUSION OF NINE CIRCUITS THAT THE FORUM SELECTION PROVISIONS OF THE LLOYD'S GENERAL UNDERTAKING ARE ENFORCEABLE.....	13
II. PETITIONER'S CONSTITUTIONAL ATTACKS ON THE UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT WERE NOT PROPERLY RAISED AND PRESERVED BELOW, AND THIS CASE WOULD NOT BE AN APPROPRIATE VEHICLE TO CONSIDER ANY SUCH ISSUE OF GENERAL CONCERN	16

Table of Contents

		Page
A.	This Case Was Not Litigated Below as a Constitutional Case	17
B.	The Petition's Failed Attempt to Conjure Up an Issue of "Growing Importance" Simply Confirms the Adequacy of Existing Law and Legislative Responses to Changed Circumstances	18
C.	Petitioner Has Shown No Basis for a Constitutional Attack on the "System" Analysis Followed by the Vast Majority of U.S. Jurisdictions and Embodied in Section 5304(a)(1) of the NYUFMJRA	19
D.	The District Court Correctly Held That Petitioner Was Not Denied Due Process in the English Proceedings	24
E.	Petitioner Has Made No Showing that the "Public Policy" Exception of the NYUFMJRA Is Unconstitutionally Narrow	30
F.	Petitioner's Attempt to Constitutionalize Hostility to Foreign Court Judgments Would Have Substantial Negative Consequences for American Citizens and National Interests	32
CONCLUSION		33

TABLE OF CITED AUTHORITIES

Page

CASES

Ackerman v. Levine,
788 F.2d 830 (2d Cir. 1986) 31

Allen v. Lloyd's,
94 F.3d 923 (4th Cir. 1996) ..... *passim*

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 23 n.28

Bonny v. Soc'y of Lloyd's,
3 F.3d 156 (7th Cir. 1993) 7

Brooks v. Haidt,
873 N.Y.S. 2d 563 (1st Dep't 2009) 15 n.16

Carnival Cruise Lines, Inc. v. Shute,
499 U.S. 585 (1991) 13

Chevron Corp. v. Donziger,
2011 U.S. Dist. LEXIS 22729
(S.D.N.Y. March 7, 2011) 19

CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.,
100 N.Y.2d 215 (2003) 20, 33

Clarkson Co. v. Shaheen,
544 F.2d 624 (2d Cir. 1976) 20 n.24

Cited Authorities

Page

Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602 (1993) 17, 17 n.20, 28, 29

D'Alessio v. New York Stock Exch., Inc., 258 F.3d 93 (2d Cir. 2001) 15 n.17

Desiderio v. Nat'l Ass'n of Sec. Dealers, 191 F.3d 198 (2d Cir. 1999) 25 n.30

DL Capital Group v. NASDAQ Stock Mkt. Inc., 409 F.3d 93 (2d Cir. 2005) 15 n.17

Gryger v. Burke, 334 U.S. 728 (1948) 25

Haynsworth v. Corp., 121 F.3d 956 (5th Cir. 1997) 7

Hilton v. Guyot, 159 U.S. 113 (1895) 22, 23, 29

Lindsey v. Normet, 405 U.S. 56 (1972) 26

Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285 (11th Cir. 1998) 7

Loucks v. Standard Oil Co., 224 N.Y. 99 (1918) 17

Cited Authorities

Page

M/S Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972) 13, 16, 32

Mitsubishi Motors Corp. v.
Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 13

Osorio v. Dole Food Co.,
665 F. Supp. 2d 1307 (S.D. Fla. 2009) 18

Pariente v. Scott Meredith Literary Agency, Inc.,
771 F. Supp. 609 (S.D.N.Y. 1991) 20 n.24

Richards v. Lloyd's of London,
135 F.3d 1289 (9th Cir. 1998) 7, 11 n.12, 15

Riley v. Kingsley Underwriting Agencies, Ltd.,
969 F.2d 953 (10th Cir. 1992) 7

Roby v. Corp. of Lloyd's,
996 F.2d 1353 (2d Cir. 1993) ..... *passim*

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) 13

Shell v. R.W. Sturge, Ltd.,
55 F.3d 1227 (6th Cir. 1995) 7

Soc'y of Lloyd's v. Ashenden,
233 F.3d 473 (7th Cir. 2000) ..... *passim*

Cited Authorities

Page

Soc'y of Lloyd's v. Blackwell,
127 Fed. Appx. 961 (9th Cir. 2005) 9 n.10

Soc'y of Lloyd's v. Grace,
718 N.Y.S. 2d 327 (1st Dep't 2000)..... 8, 30

Soc'y of Lloyd's v. Reinhart,
402 F.3d 982 (10th Cir. 2005)..... 8 n.8, 23, 30

Soc'y of Lloyd's v. Siemon-Netto,
457 F.3d 94 (D.C. Cir. 2006)..... 8, 8 n.8, 30

Soc'y of Lloyd's v. Turner,
303 F.3d 325 (5th Cir. 2002)..... 8 n.8, 30

Sung Hwan Co. v. Rite Aid Corp.,
7 N.Y.3d 78 (2006)..... 31

Tumey v. Ohio,
273 U.S. 510 (1927) ..... *passim*

INT'L CASES

Soc'y of Lloyd's v. Fraser,
[1998] C.L.C. 1630 (A.C.) 6

Soc'y of Lloyd's v. Jaffray,
[2002] EWCA Civ 1101 (A.C.) 7

Soc'y of Lloyd's v. Leighs,
[1997] C.L.C. 759 (Q.B.) 4 n.5, 6

Page

Soc'y of Lloyd's v. Wilkinson,
[1997] C.L.C. 1012 (Q.B.) 6

STATUTES

U.S. Const. amend. I 18

U.S. Const. amend. VII 30

U.S. Const amend. XIV 11 n.12, 23, 29, 32

28 U.S.C. §§ 4101-4105 ..... 18 n.21

Fed. R. Civ. P. 44.1 ..... 2 n.2, 11 n.12

N.Y. C.P.L.R. § 5301 et seq.
(NYUFMJRA) ..... *passim*

N.Y. C.P.L.R. § 5304 ..... 19, 30

OTHER AUTHORITIES

ALI, Proposed Foreign Judgment Recognition
Act (2005) 21, 23

Steven Brostoff, *Powell Blasts Lloyd's Provision in Bankruptcy Bill*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, Mar. 19, 2001 ..... 24 n.29

Cited Authorities

Page

Kathleen Day, *Bankruptcy Bill Benefits Chosen Few; Well-to-Do Investors Sought Special Provision*, WASH. POST, Mar. 10, 2001 ..... 24 n.29

Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 ..... 16, 22 n.27

Meeting Notice, 76 Fed. Reg. 26333 (May 6, 2011) 16

NCCUSL, Uniform Foreign Money Judgment Recognition Act (1962) ..... *passim*

NCCUSL, Uniform Foreign-Country Money Judgment Recognition Act (2005) 20-21, 21 n.25, 22

Restatement (3d) of Foreign Relations Law § 482(1)(a)(1987) 21 n.26

1 Weinstein, Korn & Miller, N.Y. Civ. Prac. ¶ 213.01 (2d ed. 2011) 15 n.16

The Society of Lloyd's ("Lloyd's") respectfully submits this opposition to Mr. Tropp's petition for certiorari.

STATEMENT OF THE CASE

This case is the last in a series of dozens, involving hundreds of similarly-situated litigants, that applied well-settled law to the same underlying facts. Petitioner was a "Name" (individual underwriter) in the insurance market administered and regulated by Lloyd's. Judgment was entered against him in the courts of England for non-payment of a mandatory reinsurance premium (the "English Judgment"). The lower courts, agreeing with at least two dozen prior U.S. decisions (including seven separate circuit-level opinions) involving identical judgments against other Names ("Equitas Premium Judgments"), found the English Judgment entitled to recognition and enforcement under New York law. The case was procedurally unusual because Petitioner brought a declaratory judgment action rather than waiting to see if Lloyd's would sue him in the U.S., but that simply invoked another well-settled issue: nine circuits have unanimously agreed that the standard agreements signed by Names designating England as the exclusive forum for litigation between themselves and Lloyd's bar them from initiating litigation against Lloyd's in the U.S.

Petitioner's current attempt to claim that the state law under which the English Judgment was entitled to recognition is unconstitutional was not properly raised and developed below, lacks substantive merit, and would, in any event, not benefit Petitioner due to the facts of his specific case. He differs from the hundreds of other Names who have litigated and lost the same issues only in his litigation tactics. There is no reason for this Court to grant review.

Nature of the Lloyd's Market and the "R&R" and Equitas Transactions

The background facts are set forth at length in the district court's opinion (10a-29a)[1] and also described in numerous prior opinions. *See, e.g. Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Allen v. Lloyd's*, 94 F.3d 923 (4th Cir. 1996). We provide only a brief summary here.[2]

Lloyd's is not itself an insurer, but administers and regulates the London-based marketplace in which individual Names such as Mr. Tropp are insurers. 10a. There were over 30,000 Names as of the early 1990s, who had unlimited personal liability for underwriting losses. Names conducted their underwriting through various agents, who determined which risks to insure on the Names' behalf, and, as an administrative convenience, through "syndicates." 10a-11a. A syndicate was formed to write coverage for a particular year, and at the end of three years would be "closed" by the purchase of reinsurance to close ("RITC") in which another syndicate (typically the successor to the same syndicate for a subsequent year) would reinsure all of the unresolved liabilities on the insurance written through the closed syndicate in return for payment of a reinsurance premium. 11a. This finalized

---

1. Petitioner's Appendix is cited as "__a."

2. Petitioner's account contains numerous inaccuracies, especially in its characterizations of what English courts decided and English law provides. Moreover, references to the complaint are irrelevant. Under Fed. R. Civ. P. 44.1 the district court properly evaluated the foreign decisions and legal context for itself and was not required to give any weight to Petitioner's self-serving allegations.

the profit or loss associated with the closed syndicate, with the relevant Names (after netting with their other underwriting results) receiving their profits or being called upon to pay their losses. 12a.

Under English law, Names had numerous potential remedies against their agents, including claims based on negligence or breach of fiduciary duty, but limited remedies against Lloyd's itself for claims other than fraud. 12a. The American courts have always understood this distinction. *E.g.*, *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1565 (2d Cir. 1993).[3] As Petitioner acknowledges, he, like all Names, signed a document called the General Undertaking in which he agreed to be governed by English law and to sue Lloyd's only in the courts of England. 13a. He fails to note that in the same document he also "irrevocably agree[d] that a judgment in any Proceeding brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction." 13a-14a, n.14.[4]

Massive losses in the early 1990s threw the Lloyd's market into crisis. In addition to claims arising from natural disasters and incidents like the Exxon Valdez oil spill, some syndicates had assumed substantial liabilities from prior years of account via RITC in return for

---

3. The Petition's contention (at 12) that there is an inconsistency between the remedies U.S. courts understood were available to Names and the subsequent results of English litigation is the result of blurring the distinction between the remedies available against agents and those available against Lloyd's itself – a distinction *Roby* and other decisions made perfectly clear

4. Names also agreed to comply with Lloyd's bye-laws, including bye-laws that might subsequently be adopted. 13a.

premiums which in hindsight proved significantly too low for the ultimate cost of the reinsured risks. 16a. Beyond the size of the losses, traditional market mechanisms began to break down, leaving syndicates "open" (such that Names would need to keep paying for additional losses as they were realized for many years into the future) because they could not obtain RITC at any price. *Allen*, 94 F.3d at 927. Substantial litigation against agents and others potentially responsible for Names' losses arose in the English courts, and it became apparent that the total assets and insurance coverage of some such defendants might be inadequate to satisfy their potential liability. *Id.* Concern grew that a market collapse could lead to non-payment of valid insurance claims. *Id.*

Against this background, Lloyd's formulated the Reconstruction & Renewal ("R&R") program to avoid market insolvency, protect the interests of insureds, resolve the intra-market litigation, and assist Names in meeting their losses. 18a. R&R had two key components. First, all Names with account liabilities from 1992 and earlier would be reinsured by a single new entity named Equitas, which would manage and run-off those liabilities. 18a-19a. The amount, if any, each Name would owe as a premium for the reinsurance would depend on his particular mix of open syndicates and the valuation of their assets and estimated future liability.[5] Second,

---

5. The calculation involved undertaking a comprehensive reserving project at a syndicate-by-syndicate level with actuarial, legal, and accounting input, lasting two and a half years with the involvement of the U.K. government. *See Soc'y of Lloyd's v. Leighs*, [1997] C.L.C. 759,775-777(Q.B.). While various technical terms were used at the time, "Equitas Premium" as used herein means the aggregate amount, if any, due from a Name based on his pro rata share of those various syndicate-level calculations, including

Names would be offered individualized discounts to their premiums out of a settlement fund totaling over $4.8 billion if they agreed to discontinue litigation and execute broad releases in favor of Lloyd's and numerous other market participants. *Allen*, 94 F.3d at 927. The decision to settle in return for a discount was voluntary (although R&R could not be effected without a sufficient percentage of Names agreeing to settle) but all Names were required to pay for the reinsurance into Equitas. Approximately 95% of the over 30,000 Names settled and R&R became effective. 20a. Bye-laws enacted by Lloyd's enabled the appointment of a substitute agent for all of the Names (including those who objected) and authorized that agent to bind the Names to the reinsurance contract with Equitas. 20a. Since 1996, Equitas has dealt with all claims on the insurance policies previously written by the reinsured Names, including those like Petitioner who have never paid their Equitas Premium.

Litigation then ensued against those remaining Names who owed money on their Equitas Premiums. 22a. Equitas assigned its litigation claims for non-payment of the Equitas Premium to Lloyd's, which then became the plaintiff.

The English courts resolved numerous threshold challenges to the mandatory nature of the Equitas reinsurance transaction, including: claims that the bye-laws requiring non-accepting Names to purchase the reinsurance were ultra vires and outside the scope of

---

payment of losses already incurred but not funded. (Such losses were accounts receivable at the syndicate level, but obviously such receivables would be of uncertain value when transferred to Equitas unless paid.)

Lloyd's authority under English law; claims that the substitute agent appointed by Lloyd's could not have bound the non-accepting Names; and various attacks on the validity of the assignment of claims from Equitas to Lloyd's. *See, e.g., Leighs*, [1997] C.L.C. 759, *aff'd* [1997] C.L.C. 1398 (C.A.); *Soc'y of Lloyd's v. Wilkinson*, [1997] C.L.C. 1012 (Q.B.); *Soc'y of Lloyd's v. Fraser*, [1998] C.L.C. 1630 (C.A.), *aff'g* [1998] C.L.C. 127 (Q.B.). In upholding the bye-laws, the courts did not take a hands-off approach, but examined and accepted the substantive reasonableness of Lloyd's response to the crisis with which it was faced. *Leighs*, [1997] C.L.C. at 781.

One key issue was the "conclusive evidence" provision, which was upheld by the English courts. 23a. This provision simply means (*Ashenden*, 233 F.3d at 478) that the specific amount of the Equitas Premium calculated for a particular Name and executed by the substitute agent on the Name's behalf cannot be challenged except for "manifest error," such as internal arithmetic mistakes or, e.g., seeking to charge the Name reinsurance for syndicates or years on which he had not participated. Thus, the calculation of the incremental premium required for each of the hundreds of different open syndicates being reinsured could not be tied up for years in litigation, with Names avoiding payment by second-guessing the numbers because different actuaries or underwriters could have reached different conclusions on the same data.[6]

---

6. No such issue would even have arisen if Lloyd's had taken a simpler approach such as simply charging each Name the same amount, or charging a premium proportionate to the amount of business each Name had conducted without attempting to value specific assets and likely future liabilities on a syndicate-by-syndicate basis, the fairer and more individualized approach Lloyd's took was not only more complex but inherently judgmental.

Once these threshold issues had been resolved, Lloyd's began to obtain Equitas Premium Judgments in England against Names. 23a. Approximately 300 such judgments were against U.S. residents. At the same time, many non-settling Names were pursuing claims of their own against Lloyd's. Several hundred of them joined together to pursue fraud claims against Lloyd's in England, which resulted in an extremely lengthy trial, with the finder of fact ultimately concluding that the Names had not proven their case. *Soc'y of Lloyd's v. Jaffray*, [2000] EWHC 51(Comm.), *aff'd* [2002] EWCA Civ 1101. Petitioner could have joined in this suit, but did not.

Relevant Prior Litigation in the U.S. Courts Between Names and Lloyd's

As noted above, the decision here was in complete conformity with two extensive and well-settled bodies of precedent.

First, over the course of the 1990s, various Names tried to sue Lloyd's (and/or other participants in the Lloyd's market) for damages and other relief in U.S. courts in violation of the General Undertaking. These efforts were uniformly rejected. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992); *Roby*, 996 F.2d 1353, *cert. denied*, 510 U.S. 945 (1993); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Allen*, 94 F.3d 923 (4th Cir. 1996) *mandamus denied*, 521 U.S. 1102 (1997); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998), *cert. denied*, 525 U.S. 943 (1998); *Haynsworth v. Corp.*, 121 F.3d 956 (5th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1988); and *Lipcon v. Underwriters at Lloyd's*,

London, 148 F.3d 1285 (11th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).[7] Those eight circuits were joined more recently by a ninth, which held that the General Undertaking likewise barred counterclaims brought by defendant Names in U.S. litigation commenced to enforce Equitas Premium Judgments. *Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94 (D.C. Cir. 2006). This present case appears to have been the only commenced by a Name against Lloyd's in a U.S. court in the last decade.

Second, Lloyd's filed lawsuits in the U.S. seeking the recognition and enforcement of English Equitas Premium Judgments under state law against Names who had not paid the amounts for which the English courts had found them to be liable. The first decisions holding in Lloyd's favor (*Soc'y of Lloyd's v. Grace*,718 N.Y.S. 2d 327 (1st Dep't 2000) and *Ashenden*, 233 F.3d at 473)) were ultimately joined by over twenty other decisions throughout the country, unanimously finding Equitas Premium Judgments to be entitled to recognition.[8] Those litigations collectively involved approximately 250 different defendant Names; others paid or reached consensual settlements with Lloyd's without litigation being instituted in the U.S.

Lloyd's has not filed any such actions against Names since 2006; all of the actions it has filed have now been concluded, and there is no particular reason to believe

---

7. *Allen* specifically involved an attempt to obtain injunctive relief against the mandatory reinsurance by Equitas.

8. Other published appellate decisions include: *Siemon-Netto*, 457 F.3d 94; *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982 (10th Cir. 2005), *cert denied*, 546 U.S. 826 (2005); *Soc'y of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002). A fairly comprehensive list of additional unpublished decisions is given at 8a n.3.

that any similar actions will be filed in the future.[9] There have been no additional Equitas Premium Judgments obtained by Lloyd's in England against U.S.-resident Names since 2004. Notably, the amicus brief filed by the American Names Association ("ANA") does not contend that any other U.S. Names of which it is aware or which it claims to represent are currently involved in litigation over the recognition and enforcement of Equitas Premium Judgments or are faced with the prospect of such litigation in the future.[10]

Petitioner's Underwriting and Litigation History

Mr. Tropp was a Name for the 1988 through 1991 years of account, underwriting policies generating approximately £1.4 million in premiums. On a net basis (with profits on some syndicates and losses on others) his underwriting proved unprofitable, as was the case for most Names during those years. He claims that his agents violated his express instructions not to place him

---

9. Lloyds is still pursuing full collection in a handful of cases where the merits issues are final.

10. Lloyd's has not been in contact with the ANA for years, and had no reason to believe that it was not entirely defunct. Its anti-Lloyd's website (www.truthaboutlloyds.com) appears as of June 1, 2011 not to have been updated since 2006. Its current brief was filed by a lawyer who unsuccessfully represented the Names in *Soc'y of Lloyd's v. Blackwell*, 127 Fed. Appx. 961 (9th Cir. 2005). ANA Br. at 2. Mr. Ryan's clients in that case did not seek certiorari from this Court and, so far as the decision indicates, did not raise any of the federal constitutional claims Mr. Tropp now asks this Court to consider The English decisions the ANA complains about were all issued in or prior to 2000, so Names were free to raise these issues in *Blackwell* and the various other decisions unanimously recognizing Equitas Premium Judgments.

on syndicates underwriting particular sorts of risks and also that he would not have continued to underwrite for the 1990 and 1991 years of account but for misrepresentations by his agents concerning the availability of stop-loss reinsurance and the proper resignation procedure. 14a-15a. He began to refuse to pay his losses in 1994 (16a-17a), requiring over £50,000 to be advanced by the Lloyd's Central Fund to avoid non-payment of valid claims of his insureds. He refused to accept his R&R settlement offer, which would have given him a £281,077 (over 75% of the total owed) discount. He subsequently reached tentative agreement with Lloyd's on the price term of a very generous settlement that would have required him to pay only $5,000, but refused to reach agreement on other material terms, causing talks to collapse. 21a, 136a-144a.

Then, six years after payment had been due, Lloyd's sued Petitioner in England, and Petitioner counterclaimed. 24a, 27a. Lloyd's was found entitled to summary judgment against him for non-payment of Equitas Premium (which had grown to £463,881.28 with eight years of prejudgment interest) both in the trial court and on appeal (111a, 150a), and his counterclaims were separately dismissed for failure to state a claim, both in the trial court and on appeal. (74a, 94a). Those decisions were accurately summarized by the district court (23a-29a), and in any event speak for themselves. We deal here only with a few of Petitioner's mischaracterizations.[11]

---

11. Complaints about the "pay now, sue later" issue (*Ashenden*, 233 F.3d at 478-79) are a red herring. All this meant was that Petitioner could not delay entry of summary judgment in favor of Lloyd's on its claim for non-payment based on having asserted counterclaims that had not yet been resolved. But those counterclaims ultimately were resolved favorably to Lloyd's,

As to what Petitioner calls his "wrongful liability" defenses, the English court found that they amounted to claims that but for the misconduct of his agents, certain risks would not have been underwritten. 132a. But that was no defense to payment, because Names were required to purchase reinsurance for the liabilities they actually had, not those they would have had but for the alleged misconduct of their own agents. This is straightforward agency law: if A's agent B wrongfully (but within the scope of apparent authority) binds A to an insurance contract with C, A is liable to C and must pursue an indemnification claim against B, with A rather than C bearing the risk that B may be judgment-proof. Because Equitas would have to pay A's obligation to C, the alleged misconduct of B was irrelevant to the amount that should be charged for that reinsurance. With the exception of a late and procedurally-improper attempt which was not followed up on (92a), Petitioner never pursued claims against his agents. [12]

---

without Lloyd's having been able to collect its judgment in the interim. Indeed, "pay now" is a misnomer, since the English court adjudicated the merits of Petitioner's counterclaims despite his failure to pay the judgment.

12. Petitioner criticizes the district court's ruling on the adequacy of his remedies against his agents (39a-40a), which analyzed the English case law on the issue, without explaining how it was erroneous under Rule 44.1. And not only does he fail to explain why the "burden" of pursuing separate claims against his agents could possibly violate his Fourteenth Amendment rights, he fails to explain why he did not seek to pursue his remedies against his agents years earlier—even before Lloyd's sued him—as many other Names did. *See Richards*, 135 F.3d at 196 (noting other Names' substantial litigation recoveries against agents in English courts).

As to the English court's treatment of the so-called "missing assets" defenses, it made clear that Petitioner would be entitled to credit for his reinsurance ("PSL") if he executed required paperwork (135a) and that if other sums had not been properly credited to his account it would have been because of his agents' misconduct. 134a. The more fanciful claims he subsequently raised about huge sums said to have gone missing were noted to have been raised for the first time on appeal and outside the scope of his pleadings. 75a-76a. Moreover, the English court indicated it would consider the merits of at least three other defenses to the monetary amount sought by Lloyd's: (1) a "wrong years" defense (i.e. any claim that he was erroneously being charged for reinsurance with respect to syndicates or years in which he had not, in fact, underwritten)(132a); (2) an alleged prior settlement (which would have presumably limited his financial liability to the alleged settlement amount) (137a-144a); and (3) arguments that Lloyd's should not be able to obtain very substantial pre-judgment interest (149a).

Despite the fact that Lloyd's had taken no steps to sue him in the U.S., Petitioner then brought this action, which was dismissed by the district court for the reasons set forth in its lengthy and thoughtful opinion (6a-54a) and then affirmed by the Second Circuit.

REASONS FOR DENYING THE PETITION

I. MR. TROPP HAS OFFERED NO REASON FOR THIS COURT TO REVIEW THE UNANIMOUS CONCLUSION OF NINE CIRCUITS THAT THE FORUM SELECTION PROVISIONS OF THE LLOYD'S GENERAL UNDERTAKING ARE ENFORCEABLE[13]

In the almost four decades since this Court decided *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), perhaps no single proposition has been as clearly established in the lower courts as the validity of the Lloyd's General Undertaking; it has been held enforceable by nine separate circuits. This Court has denied review in all seven of the cases in which it was sought. Supra 7. The various circuits' decisions set forth at length their application of this Court's teaching in *Bremen*, as well as subsequent cases such as *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). Petitioner has failed to explain how all of these circuits could have unanimously misapprehended this Court's rulings, or to point to anything that has changed since the last time this Court was asked to review the issue.

Moreover, as noted above, the wave of litigation between Names and Lloyd's in the U.S. courts has now ended, and Mr. Tropp is the only Name to commence U.S.

---

13. Because this threshold venue issue is logically prior to the lower courts' alternative merits ruling on the English Judgment, we are addressing it first, as the lower courts did, although the Petition takes the points in reverse order.

litigation in violation of the General Undertaking in the last decade. All of his meritless attacks on the General Undertaking involve fact-intensive assertions about alleged deficiencies of English-law remedies supposedly unique to litigation involving Lloyd's.

Furthermore, Mr. Tropp claims error (Pet. at 35) only insofar as the General Undertaking prevented him from pursuing a vaguely-pleaded cause of action for an "accounting," not based on any federal or state statute or regulation.[14] But none of his groundless complaints about the scope of English remedies actually relate to this accounting cause of action, nor has he made any effort, either here or below, to show that his accounting claim would be in the least bit viable in New York if the General Undertaking had not been enforced.[15]

First and foremost, even if the accounting claim were not precluded by the res judicata effect of the English court's dismissal of Mr. Tropp's counterclaims, it would have been time-barred on its face. Mr. Tropp did not sue until 2007, but the transactions as to which he seeks an accounting would have occurred no later than 1996. In

---

14. Because the lower courts elected in the alternative to reach the merits of the NYUFMJRA claims, the applicability of the General Undertaking to bar the preemptive declaratory judgment claim (without prejudice to his right to defend himself if and when Lloyd's had ever opted to bring a collection action) is now effectively moot.

15. His other claims about the inadequacy of remedies are difficult to follow as well as irrelevant to the claims he sought to litigate in the U.S. For example, he complains (Pet. at 16) that the English court held he had no contractual remedies against Lloyd's without disclosing that his English pleadings failed to invoke any "express reliance upon express terms of contract, or indeed implied terms of contract, between [himself] and [Lloyd's]." 61a.

New York, accounting claims are subject to a six-year limitations period, which would have run out in 2002.[16] Even if the time bar could be evaded, Mr. Tropp has not shown any material difference between New York law and English law applicable to accounting claims, nor has he shown that New York's choice-of-law principles would not mandate the applicability of English law.[17] This is thus the polar opposite of cases like *Richards*, where the plaintiff Names alleged causes of action under the federal securities laws which the English courts concededly would not entertain (under English choice-of-law rules), and the question was whether the different remedies available in England were sufficiently adequate to make the General Undertaking enforceable.[18] Here Mr. Tropp has not plausibly demonstrated that there would be *any* difference in substantive law if he were allowed to disregard the General Undertaking and litigate in New York instead of England.

---

16. 1 Weinstein, Korn & Miller, N.Y. Civ. Prac ¶ 213.01 (2d ed. 2011); *Brooks v. Haidt*, 873 N.Y.S. 2d 563, 564 (1st Dep't 2009).

17. All of the relevant contacts here other than plaintiff's domicile would point to English law even without the choice-of-law agreement. Moreover, Lloyd's is akin to private American self-regulatory organizations such as the New York Stock Exchange. *Roby*, 996 F.2d at 1357 (drawing that comparison). Courts have repeatedly recognized common-law immunity from liability for the NYSE and similar entities that is even more protective than that available to Lloyd's under English law. *See DL Capital Group v. NASDAQ Stock Mkt. Inc.*, 409 F.3d 93, 97 (2d Cir. 2005); *D'Alessio v. New York Stock Exch., Inc.*, 258 F.3d 93, 106 (2d Cir. 2001). There is thus no claim that New York's choice of law rules would, much less would be constitutionally required to, disregard Lloyd's statutory immunity.

18. Petitioner has made no argument based on the securities laws, making the discussion in the ANA brief a complete non sequitur.

Finally, this would be a particularly inopportune time for this Court to devote its limited resources to revisiting its well-settled case law on international forum selection clauses because the legal landscape may be imminently changing. The United States has signed the Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 ("HCCCA"). While the Senate has not yet ratified HCCCA, the State Department recently announced (76 Fed. Reg. 26333 (May 6, 2011)) an open meeting for June 15, 2011 to solicit input into legislation for implementing the treaty. If and when the HCCCA is ratified, the lower courts will no doubt begin to encounter questions about how prior decisional law is or is not consistent with the new backdrop, and this Court will have the opportunity to provide appropriate guidance.

II. PETITIONER'S CONSTITUTIONAL ATTACKS ON THE UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT WERE NOT PROPERLY RAISED AND PRESERVED BELOW, AND THIS CASE WOULD NOT BE AN APPROPRIATE VEHICLE TO CONSIDER ANY SUCH ISSUE OF GENERAL CONCERN[19]

Almost four decades ago, this Court said "We cannot have trade and commerce in world markets ... exclusively on our terms, governed by our laws, and resolved in our courts." *Bremen*, 407 U.S. at 9. Over a half-century before that, the future Justice Cardozo said: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."

---

19. Petitioner's certificate of service does not indicate that the Attorney General of New York was served as required by Rule 29(4)(c).

Loucks v. Standard Oil Co., 224 N.Y. 99, 110-11(1918). Rejecting such a provincial attitude, the various states have generally chosen to adopt balanced approaches to the recognition of foreign judgments.

A. This Case Was Not Litigated Below as a Constitutional Case

Petitioner has not asked this Court to review the lower courts' interpretations of New York statutory law in this case. However, to the extent they were raised at all, the constitutional arguments he now seeks to focus on were treated as throwaways in his briefing below. Indeed, of the total of 154 pages over five briefs submitted by Mr. Tropp in the district court and court of appeals, the point headings labeled as constitutional attacks on the statute ("NYUFMJRA") took up less than ten pages. Mr. Tropp now blithely asserts (Pet. at 4) that the law the English courts applied would be unconstitutional under *Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602 (1993) if adopted in an American jurisdiction, but *Concrete Pipe* was not cited even once by Mr. Tropp below. Likewise, *Tumey v. Ohio*, 273 U.S. 510 (1927) was never cited in the district court.[20] Instead, the district court's discussion on

---

20. While the Second Circuit's correct application of *Tumey* did not turn on any disputed facts, Petitioner's meritless *Tumey*-based arguments are based on false factual assertions on questions where Lloyd's did not make a full factual record in the district court because the issue had not been raised. Similarly, the *Concrete Pipe* argument, raised for the first time in the Petition, is based on a false analogy between two different sets of complicated factual circumstances, but the record below in this case was not made with an eye toward rebutting a false analogy that Mr. Tropp had not yet asserted.

constitutional issues focused on, and rejected (53a-54a), Mr. Tropp's strained analogies to foreign libel judgments raising First Amendment concerns. Mr. Tropp essentially abandoned that argument in the Second Circuit but apparently seeks to revive it here.

B. The Petition's Failed Attempt to Conjure Up an Issue of "Growing Importance" Simply Confirms the Adequacy of Existing Law and Legislative Responses to Changed Circumstances

The wave of litigation involving the enforcement of Equitas Premium Judgments is now over except for this case. It is unlikely that the extraordinarily fact-bound nature of Petitioner's criticisms of English law would provide a good opportunity to address issues of broader interest to American courts and other litigants. But there is no pressing need for this Court to address any such broader issue. Petitioner refers (at 26-27) to cases raising First Amendment concerns, but does not mention that Congress has addressed these concerns by enacting a statute just last year that explicitly limits the recognition (in state and federal court) of foreign judgments in defamation cases that do not comport with substantive American First Amendment doctrine.[21] New York already provided similar protection.[22]

Petitioner also points to recent controversies about huge verdicts issued against American defendants in Latin American jurisdictions. But *Osorio v. Dole Food Co.*, 665

21. Pub. L. 111-223, codified at 28 U.S.C. §§ 4101-4105

22. CPLR 5304(b)(8)(adopted 2008).

F. Supp. 2d 1307 (S.D. Fla. 2009), applied Florida's similar statute to the facts of the case and *denied* recognition, hardly showing that the statute was unconstitutionally underprotective of American judgment debtors' interests. Likewise, in the high-profile case of *Chevron Corp. v. Donziger*, 2011 U.S. Dist. LEXIS 22729 (S.D.N.Y. March 7, 2011) (alluded to but not cited, Pet. at 27), the court relied on the NYUFMJRA in preliminarily enjoining a judgment against a U.S. defendant in Ecuador, similarly undercutting any claim that the current statute is unconstitutionally underprotective.

C. Petitioner Has Shown No Basis for a Constitutional Attack on the "System" Analysis Followed by the Vast Majority of U.S. Jurisdictions and Embodied in Section 5304(a)(1) of the NYUFMJRA

The NYUFMJRA compulsorily denies recognition to foreign judgments rendered under a "system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." This is not a quirk of New York law, but a key provision of the model Uniform Foreign Money Judgments Recognition Act ("UFMJRA"), originally promulgated in 1962 and eventually enacted in 32 states. Courts have consistently held the statute means what it says, i.e. that the American court is not to delve into idiosyncratic or case-specific complaints if the judgment was rendered by a judicial system which is fair as a whole.[23] As the Seventh Circuit

---

23. NYUFMJRA does specify various other case-specific grounds for denying recognition, such as lack of timely notice and fraud on the foreign court, which are not present here.

said in *Ashenden*, "the statute, with its reference to 'system,' does not support such a retail approach." 233 F.3d at 477. Moreover, as a practical matter, the "retail" approach could be so fact-specific that it would "in effect give the judgment debtor a further appeal on the merits," which, among other things, would be "inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions." *Id.*[24] New York's Court of Appeals has held that the "relevant inquiry under...5304(a)(1) is the overall fairness of England's legal 'system,' which is beyond dispute." 4a (citing *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221 (2003)).

The question is not whether this "system" approach is obligatory, but whether it is within the range of constitutionally permissible options. In 2005, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") proposed a revised version of the UFMJRA, the Uniform Foreign-Country Money Judgments

---

24. As the Seventh Circuit correctly observed, a judgment debtor's complaints about having been denied "due process" can rapidly shade into an attempt to obtain de facto appellate review in the American court of the foreign court's decisions on close questions of its own law of procedure or evidence. But it is clear that the foreign court's alleged error of law, whether substantive or procedural, is not a basis for denying recognition to the resulting judgment, anymore than a New York court can deny full faith and credit to a California judgment because it believes that the California court made errors of California law. *Clarkson Co. v. Shaheen*, 544 F.2d 624, 631 (2d Cir. 1976) (no basis to refuse recognition on "mere assertion ... that the judgment was erroneous in law or in fact"), *Pariente v. Scott Meredith Literary Agency, Inc*, 771 F. Supp 609, 616-617 (S.D N.Y. 1991) (refusing to conduct *de facto* appellate review of French tribunal's French law rulings).

Recognition Act ("UFCMJRA"). It retains the "system" test (§ 4(b)(1)), with commentary indicating that the *Ashenden* decision represented a good interpretation of that test, but also added a *discretionary* ground for non-recognition (§ 4(c)(8)) that "the specific proceeding in the foreign court leading to the foreign country judgment was not compatible with the requirements of due process of law." The new proposed statute did not *require* "retail" inquiry in any given case, but would merely give courts discretion to consider it.[25] The American Law Institute Proposed Foreign Judgment Recognition Act (the "ALI Proposed Statute"), also promulgated in 2005 although not thus far enacted, expressly considered but *rejected* a provision similar to the NCCUSL's proposed section 4(c)(8) because the ALI had reached a differing view on the policy question presented.[26] Instead, section 5(a)(i) of the ALI Proposed Statute is virtually in haec verba with the traditional "system" provision of the UFMJRA, and

---

25. Petitioner seems to be arguing that the UFCMJRA's proposed section 4(c)(8) be *mandatory*, which is, so far as the Petition shows, not currently the law in any American jurisdiction.

26. At the time the ALI Proposed Statute was promulgated, the ALI's president was amicus Michael Traynor, whose brief (at 8) mentions the existence of this proposal without acknowledging that it contradicts Petitioner's current position. Presumably, the ALI does not encourage Congress to enact unconstitutional statutes, and it seems improbable that Mr. Traynor would have presided over such a high-profile proposal while harboring personal reservations that it was unconstitutional. The other amicus who signed the same brief is Geoffrey Hazard, who served as the ALI's director in 1987 when it issued the Restatement (3d) of Foreign Relations Law, Section 482(1)(a) of which endorses the "system" approach of the UFMJRA and does not suggest it has any constitutional infirmities.

comment c expressly provides that a "showing that the judgment debtor was not dealt with fairly in the particular case will not defeat recognition or enforcement" under that subsection, because "[s]uch a detailed inquiry into the foreign judgment is inconsistent with the pro-enforcement philosophy of the [proposed] Act."

States are free to adopt the UFCMJRA with its proposed section 4(c)(8) as an alternative to the UFMJRA; some have, but others, including New York, have not.[27] The NCCUSL did not suggest that the proposed discretionary ground for non-recognition is constitutionally required or the previous model statute it had recommended was constitutionally infirm; indeed, that would make it difficult to understand why proposed section 4(c)(8) is discretionary rather than mandatory.

Hilton v. Guyot, 159 U.S. 113 (1895), cannot help Petitioner. *Hilton* did not claim to be constitutionally-driven; rather it enunciated comity-based rules for recognition of foreign judgments in the absence of an applicable statute. The suggestion that *Hilton's* reference to a "full and fair trial" requires the "retail" approach is

---

27. The HCCCA also has provisions related to the enforcement of judgments in cases where an exclusive forum selection agreement existed. Those provisions include permissive carve-outs for non-recognition that would permit a signatory jurisdiction to utilize a provision like section 4(c)(8), thus accommodating the current minority practice within the United States. That obviously provides no support for an argument that the Constitution requires the minority adoption of a discretionary ground for non-recognition to be transformed into universal adoption of a mandatory ground.

no more plausible than a claim that the same language requires denial of the recognition of judgments obtained without "full ...trial" through, e.g., the equivalent of American summary judgment practice. The very same sentence from *Hilton*, when expanded from the snippet selectively quoted by Petitioner, includes the phrase "a system of jurisprudence likely to secure an impartial administration of justice," 159 U.S. at 202, and has been relied on by both the ALI and NCCUSL as the basis for their "system" approaches. *See* §5, cmt. c, ALI Proposed Statute; § 4, cmt. 5, UMFJRA. Indeed, the Tenth Circuit held that *Hilton* required the court "to examine the entirety of the foreign judicial *system*, and not the particularity of individual judgments." *Reinhart*, 402 F.3d at 1000 (emphasis in original).

Petitioner has failed to show any reason why the policy choices made by the various states should not be respected, or how hitherto unknown principles limiting those policy choices could be found concealed within the Fourteenth Amendment. There is no reason here for skepticism as to the results of the legislative process.[28] To put it mildly, American judgment debtors who have failed to pay foreign judgments in favor of foreign judgment

28. This is the polar opposite of cases such as *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (Pet. at 28), where the concern is that parochialism will benefit in-state litigants at the expense of out-of-state adversaries. Here, Petitioner is perversely arguing that parochialism is mandatory and a more cosmopolitan attitude forbidden.

creditors are not a classic "discrete and insular minority" in need of special judicial solicitude.[29]

D. The District Court Correctly Held That Petitioner Was Not Denied Due Process in the English Proceedings

Although the Second Circuit found it unnecessary to reach the issue, the district court found in the alternative that "[n]ot only does the English system as a whole provide due process, there is no evidence that it denied due process in Tropp's particular case." 46a. As the court went on to note,

> at six separate stages in the proceedings ... the English system afforded Tropp an opportunity to be heard, and he submitted extensive briefings which were meticulously considered by judges. In turn, the judges issued 59 single-

29. Names refusing to pay their Lloyd's-related obligations have not generally been hapless underdogs with no access to the political process. Indeed, in 2001 members of amicus ANA were able to have special provisions inserted by Congressional allies into draft bankruptcy reform legislation which would have de facto overturned existing pro-Lloyd's precedents in the federal courts and placed Lloyd's at a unique disadvantage as compared to other foreign entities in litigation with U.S citizens. See Kathleen Day, *Bankruptcy Bill Benefits Chosen Few; Well-to-Do Investors Sought Special Provision*, WASH. POST, Mar. 10, 2001, at A1. The proposed legislation (which had severe constitutional flaws because of, among other things, how it singled Lloyd's out,) was criticized by the State Department (Steven Brostoff, *Powell Blasts Lloyd's Provision in Bankruptcy Bill*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, Mar. 19, 2001, at 1) and ultimately did not pass.

spaced pages of opinions (comprising some 178 separately numbered paragraphs). The fact that Tropp did not prevail in any of these hearings does not mean that the English system lacks due process.

47a.

Petitioner provides no cogent argument as to why the district court's fact-intensive and record-bound determination was erroneous. He argued at great length below that the English courts misconstrued English law, and indeed the McBride amicus brief devotes almost half its substance to claiming that the English courts misconstrued the intent of Parliament.[30] But this Court has made it clear in the domestic context that a disputed judicial interpretation of state law cannot be bootstrapped into a federal civil rights claim. *Gryger v. Burke*, 334 U.S. 728, 731 (1948) ("we are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then

30. Like the ANA brief, the McBride brief is essentially that of a "sore loser." Mr. McBride admits that he is no disinterested academic; rather (brief at 1 n.1), he is a barrister who apparently represented Petitioner in a failed attempt to get the European Court of Human Rights to intervene and overrule English law. None of his mischaracterizations of English law (which were not presented to the lower courts) are relevant to the NYUFMJRA's constitutionality. His contention that Lloyd's is viewed as a private entity in some legal contexts and a public or quasi-public entity in others is hardly scandalous. American SRO's are entitled to broad immunity because of their quasi-public functions, supra at n.15, while simultaneously not being treated as state actors in other contexts. *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198, 206 (2d Cir. 1999).

set up our own interpretation as a basis for declaring that due process has been denied"). The English courts were extremely patient with Mr. Tropp, gave him the benefit of the doubt in view of his pro se status, and carefully evaluated all the legal and factual contentions he made (many of which were foreclosed by binding English appellate precedent) before finding them insufficient. That is all that due process requires.

As for Petitioner's claim that he was denied a "due process" right to put on evidence disputing the amount of Lloyd's claim against him, what evidence may be presented in any case necessarily depends on its relevance, which in turn necessarily depends on the applicable substantive law. *Lindsey v. Normet*, 405 U.S. 56, 68 (1972) (state procedure did not violate Constitution by barring evidence which would not support valid defense under substantive law). In fact, the English courts permitted Mr. Tropp to dispute the amount of Lloyd's claim against him in at least four different ways described above. Supra 12. That none of these arguments ultimately prevailed does not raise any due process concerns.

Indeed, Petitioner has not cited any U.S. authority that a defendant in a civil case has a free-floating due process right to challenge the calculation of plaintiff's damages on any basis that can be imagined. When a contract contains a clear price term (as was the case here) and the goods or services have been fully delivered or performed but not paid for (as was the case here, since Equitas has provided Petitioner with full reinsurance protection despite his lack of payment), damages may be constitutionally awarded based on no more evidence

than the contract price.[31] His claim that he never agreed to that price is simply a variation of his claim that he never agreed to purchase the reinsurance at all, but was involuntarily bound to the contract. But whether Lloyd's had the regulatory authority to bind him and other Names to the contract (including its price term) was a question of substantive English law that has nothing to do with procedural due process. As the district court noted (48a), separate complaints about the substantive English law under which particular evidence was irrelevant cannot be squeezed into this due process analysis. *Ashenden*, 233 F.3d at 480 ("the cases that deal with international due process talk only of procedural rights").

The Second Circuit rejected Petitioner's *Tumey*-based claim because (5a), although "the UK courts gave conclusive effect to Lloyd's calculation of Tropp's liability, the UK courts themselves had no financial interest in the outcome of Tropp's case."[32] Petitioner makes no claim to the contrary, nor could he. The claim that *Tumey* goes beyond a guarantee of unbiased judges and somehow makes it unconstitutional for a neutral and financially-disinterested judge to apply principles of substantive law that permit one party to a voluntary private arrangement whose governing documents so provide (whether via

---

31. In any event, Petitioner made no showing in the record below that he had evidence the English courts refused to consider which would have led any reasonable factfinder to conclude that the amount of his Equitas Premium fell outside the range of reasonableness.

32. In *Tumey*, the magistrate personally retained the fines he levied. 273 U.S. at 520.

contract or via the bylaws of a private organization) to calculate financial obligations due from the other despite an alleged financial stake in the determination is fanciful. No such principle can be determined from the cases cited, many of which were in any event not cited below.[33] In any event, such an improbable extension of *Tumey* would not help Petitioner because the underlying premise that Lloyd's had a financial interest in overcharging Petitioner for reinsurance coverage at the time his Equitas Premium was determined is simply false.[34]

Nor would the *Concrete Pipe* analogy never raised below have done any good if timely raised. In *Concrete Pipe*, Congress had intervened after the fact to change the rules applicable to pre-existing private arrangements—conferring on certain pension plan trustees a new statutory right to pursue "withdrawal" liability claims against employers who had formerly contributed to the plans but had never agreed (either by contract or the equivalent of a process for enactment of future bye-laws) to pay such liability. This was a key reason that the Court

---

33. Except for *Tumey*, *Hilton* and *CIBC*, none of the cases cited in the Hazard/Traynor amicus brief (which focuses on the *Tumey* argument) were cited below.

34. As noted above, no factual record was made on this issue. Such a record would have established that Lloyd's incentive, if anything, was to make the premiums as low as possible (in order to encourage participation and voluntary payment by a high enough percentage of Names to make the R&R transactions feasible) while also making them sufficiently high for Equitas to be adequately capitalized to run off the risks it was assuming (and satisfy relevant regulators of that fact). Nor could Lloyd's have identified ex ante which Names would be in the tiny minority who would not pay their Equitas Premiums and need to be pursued in court.

determined that the trustee's determination of the amount due could not be unreviewable. Moreover, the Court determined that the trustee had a systematic incentive to overcharge withdrawing employers; by contrast, there is simply no basis to claim that Lloyd's had any structural incentive to overcharge Names in general, much less the Petitioner individually.[35]

In any event, the Seventh Circuit noted, *Ashenden*, 233 F.3d at 478, probably no foreign legal system has adopted "every jot and tittle of American due process" as set forth in our case law, and there can be no claim that those exact procedures must be followed for a foreign judgment to be recognized. *Concrete Pipe* is a perfect example of the sort of the "jot and tittle" presented by the evolution of Fourteenth Amendment doctrine that we should not expect any other country's judicial system to have adopted in precisely the same fashion. Indeed, in *Hilton*, this Court was not troubled by features of French procedure that would be unacceptable in our country, such as the use of unsworn testimony not subject to cross-examination. 159 U.S. at 204-205.

This point is particularly compelling here, since Petitioner expressly *agreed* to litigate his Lloyd's-related disputes under English law in English courts (as well as expressly agreeing to be bound by future Lloyd's bye-laws). Even if a defendant *involuntarily* haled into a foreign court might have some right to resist enforcement

---

35. *See* supra n.34. Again, because of Petitioner's failure to cite *Concrete Pipe* below, no record was made on the numerous material factual differences between the Equitas/R&R transactions and the U.S. statutory scheme regulating multi-employer pension plans.

in the U.S. of the resulting judgment due to procedural variations from U.S. standards, Petitioner has made no showing whatsoever that such a right could not, as a matter of constitutional law, be waived. The Seventh Amendment right to jury trial can uncontroversially be waived by contract. Any number of constitutionally-mandated procedural protections available in an American court proceeding can uncontroversially be waived by agreeing to a binding arbitration agreement. Petitioner provides no argument whatsoever as to how the Constitution could prevent New York from deciding to enforce his voluntary agreement to be bound by English law as interpreted by English courts.

E. Petitioner Has Made No Showing that the "Public Policy" Exception of the NYUFMJRA Is Unconstitutionally Narrow

Section 5304(b)(4) of the NYUFMJRA gives a court the discretionary authority to decline to recognize a foreign judgment if "the cause of action on which the judgment was based is repugnant to the public policy of this state." Petitioner failed to convince the lower courts that the English Judgment should be denied recognition on this basis. Similar claims have been consistently rejected in other decisions recognizing Equitas Premium Judgments, both in New York and across the country. *Grace*, 718 N.Y.S.2d at 328; *Turner*, 303 F.3d at 333; *Ashenden*, 233 F.3d at 478-80; *Siemon-Netto*, 457 F.3d at 99-100; *Reinhart*, 402 F.3d at 995.

The claim that the "cause of action" is the wrong level of generality, because some contracts might violate public policy even though contract-based claims in general

would not, is a non sequitur, not a constitutional argument. Petitioner conjures up a speculative parade of horribles involving foreign court judgments enforcing contracts that were racially discriminatory or involved drug sales or prostitution, but points to no actual cases where U.S. courts have felt obligated to recognize and enforce such judgments on the theory that "breach of contract" was the only level of generality that could be considered.

In any event, the district court fully recognized (52a) that "Tropp is correct that the cause of action in Lloyd's case against him was not a run of the mill, or 'plain vanilla' contract claim." However, it proceeded (*id.*) to say "[r]egardless of whether such a scheme would be acceptable under New York contract law, we cannot say that the English courts' decision to bind the Names under these circumstances is repugnant to the public policy of New York."[36] It is well-established that New York will not find a foreign judgment repugnant to its own public policy simply because of differences in substantive law. *See, e.g. Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 79 (2006) (granting recognition to judgment where South Korean tort law permitted recovery on facts insufficient to support liability under New York law); *Ackerman v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986) (reversing

---

36. Thus, the district court's analysis merely assumed arguendo that the details of the English substantive law applied here might differ from those potentially applicable in New York. Petitioner has never shown that a similar result would be impermissible under New York law, much less contrary to public policy, under analogous circumstances involving a private self-regulatory organization's ability to enact bye-laws binding its members to certain financial obligations considered appropriate to meet the challenge of a market-threatening crisis.

refusal to recognize German judgment). Petitioner offers no conceivable rationale as to why the Fourteenth Amendment could possibly obligate New York to adopt a more parochial public policy than it has freely chosen for itself, or, again, why any such right to avoid unfavorable foreign substantive law would be unwaivable.

F. Petitioner's Attempt to Constitutionalize Hostility to Foreign Court Judgments Would Have Substantial Negative Consequences for American Citizens and National Interests

As this Court said in *Bremen*, 407 U.S. at 9, "The expansion of American business and industry will hardly be encouraged if, not-withstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." Permitting Americans such as Petitioner who have voluntarily entered into profit-seeking business ventures in foreign countries with indisputably fair legal systems to flee the obligations those legal systems have imposed on them would obviously have dire consequences for other Americans willing to live up to their freely-assumed obligations. Foreign entities would need to reassess the litigation risk associated with doing business with Americans, or demand that any prospective American business partner maintain sufficient assets within the foreign jurisdiction to satisfy any potential liability that might arise. Enforcing voluntary agreements to litigate in a specified foreign forum, as this Court's case law mandates, is of limited practical use if there is no assurance that that forum's subsequent judgments will be recognized.

Even more significantly, constitutionalizing hostility to the recognition and enforcement of foreign judgments

would predictably make foreign judicial systems more hostile to the recognition and enforcement of American judgments entered against their own nationals. That would undermine the interests of American judgment creditors with claims against foreign defendants, possibly representing a much wider cross-section of American society than individuals who choose to engage in business ventures abroad. A traditional rationale for generous enforcement of foreign judgments in the U.S. is precisely to encourage similar treatment of U.S. judgments by foreign courts. *CIBC*, 100 N.Y.2d at 221. Reasonable minds can disagree as to whether that is the best policy, but the Constitution leaves state legislatures (and Congress) free to make that decision for themselves.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

JOHN W. BREWER
Counsel of Record
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212)-859-8000
john.brewer@friedfrank.com

Attorneys for Respondent

June 3, 2011